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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 206.

EUGENE KOSTER,

Petitioner,

—against—

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STUART N. UPDIKE,
Attorney for Respondent.

EDWARD M. MAHER,
FRANK W. GLENN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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The Opinions Below.

The opinion of the District Court (R. 30-37) is reported at 64 F. Supp. 595.

The opinions of the Circuit Court of Appeals (R. 42-49) are reported at 153 F. (2d) 888.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 4, 1946 and its order denying a petition for rehearing was filed March 18, 1946 (R. 68). The issuance of a writ of certiorari is sought pursuant to §240 of the Judicial Code, 28 U. S. C. §347 (Petition, p. 1).

Statement.

Petitioner, a citizen of New York and a resident of its Eastern District, since May, 1941 and now a member and policyholder of (American) Lumbermens Mutual Casualty Company, a mutual insurance corporation organized under Illinois law (hereinafter called "Lumbermens") has brought this derivative action, based on diversity, in its right and on behalf of all its policyholders* against Lumbermens, James S. Kemper, a citizen and resident of Illinois and James S. Kemper & Co., Inc., an Illinois corporation (hereinafter called "Kemper & Co.").†

First Cause of Action.

This cause (against defendants Kemper and Lumbermens) asserts that for 1942 Kemper received an unwarranted increase in salary and other compensation from Lumbermens and that to the extent of the increase over 1941, the payments were without consideration and constituted a gift of corporate assets (R. 3-6).

Second Cause of Action.

This cause (against all three defendants) claims that Kemper at all relevant times dominated and controlled the management, personnel and business policies of Lumbermens and of Kemper & Co.; that

* Plaintiff is one of over 400,000 such policyholders (R. 3-4). No other policyholder has joined him.

† On December 27, 1944 Kemper & Co. moved to dismiss on the grounds that (a) it was not qualified to do, and was not doing, business in New York State; and (b) it was not properly served. By order filed February 28, 1945, said motion was denied without prejudice as moot, in view of the prior determination which is the subject of this petition.

Kemper & Co. has received commissions, fees and other payments for agency and other services in the transaction of insurance business for Lumbermens which Lumbermens could have rendered as efficiently for itself with its own organization, personnel and facilities; that Lumbermens "could have secured the same amount of business" without employing and paying Kemper & Co.; that Kemper & Co. employed Lumbermens' facilities and assets in the conduct of its business; that the precise amounts of damage to Lumbermens and of profits to others are unknown to plaintiff; and that plaintiff is without adequate remedy at law (R. 6-8).

Third and Fourth Causes of Action.

The third and fourth causes (against defendants Kemper and Lumbermens) are parallel. They respectively allege that Kemper wilfully caused Lumbermens at various times to sell approximately 15,000 shares of stock and $112,050 principal amount of debentures out of Lumbermens' portfolio to himself and to others for sums substantially less than the true value of such securities; that the vendees were officers or directors of Lumbermens or their relatives, friends or business associates (R. 9-14).

The Prayer.

The plaintiff prays:

(1) That defendants in each cause of action, except Lumbermens, be required to account to Lumbermens for the alleged damages and profits, with interest;

(2) That plaintiff be awarded the costs and expenses of the action, including, of course, "reasonable counsel and accountants' fees" (R. 14).

Lumbermens moved to dismiss the complaint on the grounds of forum non conveniens and absence of an indispensable party defendant. The former is the only ground before this Court.

The Facts.

The facts set forth in the moving papers were not challenged by denials from plaintiff, nor were affirmative facts brought forward by plaintiff to contradict or qualify the position of defendant Lumbermens presented by the moving affidavits (R. 19-28, 47). In short, it appeared:

(1) Lumbermens is a mutual insurance company, organized in 1912 in Illinois, where it has since continuously maintained its principal office (R. 20);

(2) Lumbermens is licensed by, and does business as an insurance corporation in, each one of the forty-seven non-domiciliary states, as well as in Canada (R. 21);

(3) Lumbermens has seven directors; five are citizens and residents of Illinois, having regular business addresses in Chicago; none are citizens or residents of New York (R. 21);

(4) All of the officers of Lumbermens are citizens and residents of Illinois, excepting the officers in the local state offices of the company across the country who would have no personal knowledge and no information concerning the issues raised (R. 21);

(5) At the principal offices in Chicago are kept all of the general records and all of the control records relating to Lumbermens' business as an

entity; by requirement of law* such records are kept available either there or in nearby warehouses (R. 21);

(6) All of the acts and transactions complained of took place in Illinois (R. 25).

Additional considerations before the District Court included:

(7) the transportation of large quantities of Lumbermens records from Chicago to the Eastern District, assuming that the provisions of Illinois law prohibiting removal were waived (R. 24);

(8) traveling expenses and subsistence of witnesses for examination before trial and, later, for the trial itself, including directors, officers and employees of Lumbermens, in addition to the officials and employees of the Illinois Department of Insurance, who have regularly audited Lumbermens books and regulated its domiciliary affairs (R. 24);

(9) the loss of time to Lumbermens of those persons in its employ caused by a trial in the Eastern District, as contrasted with a trial in Illinois, with the attendant consequence of direct monetary loss and immeasurable indirect damage to its day-to-day business and the necessity of hiring inexperienced substitute employees (R. 24);

(10) the inconvenience to the Court of construing the numerous provisions of the Illinois Insurance Code, as well as the numerous regula-

* Ill. Rev. Stat. (State Bar Ass'n Ed. 1943) c. 73, §745, provides: "(2) All such books, records, documents, and vouchers of the home office of any domestic [insurance] company • • • shall be preserved and kept available in this State • • • ."

tions issued by the Insurance Department from time to time thereunder (R. 26);

(11) the injustice of imposing this expense on Lumbermens, whether plaintiff is successful or unsuccessful (R. 23-24);

(12) the injustice of imposing this expense on Lumbermens, where there is but negligible cost and no inconvenience to plaintiff in remitting him to the Illinois courts. The only proof to come from plaintiff personally is that he is one of Lumbermens' 400,000 policyholders (R. 24-25);

(13) the injustice of requiring Lumbermens to defend in the forum of plaintiff's residence when plaintiff has never (a) attended any meeting of Lumbermens' policyholders, (b) written or spoken any criticism of the conduct of its affairs to its Board of Directors, (c) written or spoken any complaint or protest concerning any grievance, whether or not now complained of, to the Director of Insurance of Illinois or the Superintendent of Insurance of New York, although the insurance laws of both states clearly contemplate the filing of such complaints by policyholders, and where the total personal gain to plaintiff even if he succeeds would be trivial (R. 25);

(14) the extreme emergency existing with respect to transportation and hotel accommodations in New York City (R. 33).

Finding that, whether plaintiff or defendant should succeed on the merits, it would be most unjust to require Lumbermens to litigate the issues in the Eastern District of New York, the District Court granted respondent's motion and dismissed the action on the ground that considerations of convenience, efficiency and justice indicated that its jurisdiction should not

be exercised. The Circuit Court of Appeals has affirmed, on the ground that maintenance of the suit in New York would be so vexatious and oppressive as to offend those considerations.

The Questions Presented.

The sole questions presented are:

1. Had the District Court discretion to decline jurisdiction under the doctrine of forum non conveniens?
2. If so, was its discretion properly exercised on the undisputed facts?

This Court is not called upon to decide whether a District Court, in a diversity case, may decline jurisdiction where, upon identical facts, jurisdiction of the state courts (as plaintiff has assumed) would be mandatory. (See Point III, *infra.*)

POINT I.

The District Court had discretion to decline jurisdiction.

The power of a court, although jurisdiction technically exists, to decline its exercise in favor of a more appropriate forum, is well settled.

Williams v. *Green Bay & W. R. R.*, 90 L. ed. 247 (1946);
Meredith v. *City of Winter Haven*, 320 U. S. 228 (1943);
Massachusetts v. *Missouri*, 308 U. S. 1 (1939);
Pennsylvania v. *Williams*, 294 U. S. 176 (1935);

Rogers v. *Guaranty Trust Co.*, 288 U. S. 123 (1933);
Canada Malting Co., Ltd. v. *Paterson Steamships, Ltd.*, 285 U. S. 413 (1932).

Plaintiff's "Absolute Right" to Sue in the District Court.

The Court's power thus to decline is not restricted to particular classes of cases; it is to be found woven among the traditional discretionary powers of courts of equity. As this Court stated in *Meredith* v. *City of Winter Haven, supra,* 320 U. S. at 235:

> "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."

Judicial discretion requires a concept of the rule with limits not rigidly fixed. In the *Williams* case, *supra,* this Court, in placing the rule of forum non conveniens in "proper perspective", stated:

> "Each case turns on its facts" (90 L. ed. at 252).

Thus the "absolute right to sue in the district of his residence" repeatedly claimed by petitioner (Petition, pp. 9-14) is one without support in the applicable case law.

Baltimore & Ohio R. Co. v. *Kepner,* 314 U. S. 44 (1941), is not authority to the contrary. It involved a statute—The Federal Employers' Liability Act—which, in creating a right of action at law, set up its own venue provisions. As Mr. Justice Frankfurter pointed out in his dissent, 314 U. S. at 55:

> "Nor does it [the majority opinion] question the familiar doctrine of forum non conveniens under

which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere. See Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 422, 423, 76 L. ed. 837, 842, 843, 52 S. Ct. 413; Massachusetts v. Missouri, 308 U. S. 1, 19, 84 L. ed. 3, 10, 60 S. Ct. 39; Rogers v. Guaranty Trust Co., 288 U. S. 123, 130, 131, 77 L. ed. 652, 656, 657, 53 S. Ct. 295, 89 ALR 720. These manifestations of a civilized judicial system are firmly imbedded in our law."

Actions brought under the Federal Employers' Liability Act are actions at law. The instant action is one in equity and "The exceptions [to the normal assumption of jurisdiction] relate to the discretionary powers of courts of equity." *Meredith* v. *City of Winter Haven, supra,* 320 U. S. at 325.

Section 51 of the Judicial Code, 28 U. S. C. §112, in providing that "suit shall be brought only in the district of the residence of either the plaintiff or the defendant", merely imposes a limitation upon plaintiff's freedom of choice. It does not, as the lower courts correctly held, confer an absolute right to maintain suit in the district of his residence.

Petitioner's brief, in addition to its claim of "absolute right", presses a construction of the decision of this Court in the *Williams* case that would construe as *dictum* the entire discussion of "vexatious or oppressive" litigation. The petition urges (pp. 6-7) that where (a) the suit is one for a money judgment and (b) no other aspect of the case involves the internal affairs of a foreign corporation, it must follow that forum non conveniens becomes inapplicable.

As we read this Court's decision in the *Williams* case, the applicability of the doctrine of forum non

conveniens is to be tested by the existence of either of two elements: (a) where the relief sought is "so extensive" or calls for "such detailed and continuing supervision that the matter could be more efficiently handled nearer home" or where the effectiveness of the decree would be doubtful; and (b) those elements relating to whether the litigation would be "vexatious or oppressive" if allowed to proceed to trial in the forum. We do not understand that both groups of elements must exist concurrently. To the contrary, we view the *Williams* case as deciding that the decision of the District Court might have been sustained by the presence of either. If petitioner's construction is correct, once this Court had concluded that the internal affairs of a foreign corporation were not involved, it was gratuitous and unnecessary to proceed to the discussion of the "vexatious or oppressive" phase of the case.

If our construction of the *Williams* case is correct, we would apply it to the instant case as stated below.

The Williams Case: The Test of "Internal Affairs".

It is respondent's contention that the instant case is one which relates to the internal management of its business, even though the complaint ostensibly seeks only a money judgment.* The *Williams* case is not to the contrary for it merely declares that where a money judgment only is sought in a representative suit, the case "normally" is one to which the rule of forum non conveniens is not applied (90 L. ed. at 251).

The second cause of action (R. 6-8) furnishes ex-

* Respondent has never conceded, as petitioner blandly asserts (Petition, p. 6), that internal affairs are not involved.

cellent illustration of proposed interference with internal management, though money only is demanded. It is there alleged that Lumbermens maintains branch offices staffed with its employees throughout the country; it advertises and entertains broker contacts; it solicits and writes insurance without benefit of an agency; by reason thereof it has the facilities to carry on business without employing Kemper & Co.; and finally

> "Lumbermen's could have secured the same amount of business and could have conducted it with equal efficiency without employing and paying for the purported services of Kemper & Co."

Here petitioner seeks to have a court decide whether Lumbermens should acquire its insurance business primarily through the use of agents or brokers or primarily through the use of its own facilities. It is a matter of common knowledge, which this Court may judicially notice, that insurance is customarily written through the medium of agents and brokers. Nevertheless, petitioner seeks to have a court find that Lumbermens could have operated "with equal efficiency" by employing only its own personnel and facilities. Necessary consequences of such a finding would be (1) the dictation of the corporation's future operations methods; and (2) a present and direct interference with the corporation's business. The fact that the sanction applied is a money award, rather than the force of an injunction, does not change the internal effect of the determination.

Under the law of respondent's domicile, it has been squarely held that an accounting such as that sought under petitioner's second cause of action constitutes

an interference with an insurance corporation's business. *People ex rel. Benefit Association of Railway Employees* v. *Miner*, 387 Ill. 393 (1944), cert. denied 324 U. S. 840 (1945).

The *Miner* case involved a derivative action by a policyholder of a mutual insurance organization on behalf of the organization and its policyholders against its officers and directors. It was alleged that the individual defendants had a financial interest in the contract between the insurer and its underwriting agent; that excessive commissions were paid to the agency by the association; that the agency used the office and employees of the association without proper compensation therefor; that the directors of the association who authorized payments of commissions to the agents eventually received this money as partners of the agency and fraudulently diverted it to themselves.

The prayer for relief demanded that the individual defendants be removed from office and declared ineligible for re-election, and that they be required to account for the company's money disbursed by them to the agency. Acknowledging that "It is conceivable that an accounting may be sought or had, or claim prosecuted which would in nowise interfere with the business of the company, such as an agent's suit for accounting as to commissions", the Supreme Court of Illinois nevertheless held that the accounting therein sought would clearly interfere with the business of the company and therefore would not be granted at the request of a private suitor (387 Ill. at 401). This conclusion was specifically reaffirmed in *People ex rel. Parkinson* v. *Williams*, 392 Ill. 224, 240-1 (1945).

The Williams Case: Test of "Vexatious or Oppressive".

Even if it be assumed that the action does not relate to respondent's internal affairs, nevertheless the District Court had discretion to dismiss the action on the ground that its maintenance in the Eastern District of New York was vexatious or oppressive. As this Court stated in the *Williams* case:

> "We mention this phase of the matter to put the rule of forum non conveniens in proper perspective. It was designed as an 'instrument of justice'. Maintenance of a suit away from the domicile of defendant—whether he be a corporation or an individual—might be vexatious or oppressive. * * * Each case turns on its facts" (90 L. ed. at 250, 252).

Moreover, as the Circuit Court pointed out (R. 47), the last paragraph of the opinion in the *Williams* case implicitly recognizes that jurisdiction should be declined if maintenance of the suit will be vexatious or oppressive, and enumerates the determinative factors.

POINT II.

On the undisputed facts, the District Court properly exercised its discretion.

Respondent does not contend, as petitioner would have it appear, that mere convenience to parties and to witnesses renders the choice of a particular forum vexatious or oppressive. Respondent does contend, however, that the circumstances can be such that maintenance of a suit in a particular forum would be so unjust that the forum will not retain it and that the instant suit involves such circumstances.

The considerations of "convenience, efficiency and justice" which have furnished the guides to discretion in determining whether or not jurisdiction is properly invoked are many and varied. They include:

The convenience or inconvenience to parties, the practical necessities of obtaining production of documents and witnesses (*Williams* v. *Green Bay & Western R. R.*; *Rogers* v. *Guaranty Trust Co.*, both *supra*; *Hirshhorn* v. *Mine Safety Appliance Co.*, 54 F. Supp. 588, 591 (W. D. Pa., 1944); *Grismer* v. *Merger Mines Corp.*, 43 F. Supp. 990, 993 (E. D. Wash., 1942), Note (1937) 50 Harvard Law Review 1119, 1181);

The amenability to process of the alleged wrongdoers (*Rogers* v. *Guaranty Trust Co.*; *Hirshhorn* v. *Mine Safety Appliance Co.*; *Grismer* v. *Merger Mines Corp.*, all *supra*; *Kelley* v. *American Sugar Refining Co.*, 139 F. (2d) 76, 78 (C. C. A. 1st, 1943); *Overfield* v. *Pennroad*, 113 F. (2d) 6 (C. C. A. 3d, 1940); *Saltz* v. *Saltz Bros.*, 84 F. (2d) 246 (App. D. C. 1936); *Miller* v. *Quincy*, 179 N. Y. 294 (1904); *Ernst* v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388 (2d Dep't 1899);

The effectiveness of injunctive or other relief that may be granted and the possibility that the domiciliary courts will render an inconsistent—and controlling—decree (*Williams* v. *Green Bay & Western R. R.*; *Rogers* v. *Guaranty Trust Co.*; *Kelley* v. *American Sugar Refining Co.*; *Grismer* v. *Merger Mines Corp.*, all *supra*; *Healey* v. *Reynolds Tobacco Co.*, 48 F. Supp. 207 (M. D. N. C., 1942); *Sauerbrunn* v. *Hartford Life Insurance Co.*, 220 N. Y. 363 (1917);

The availability of an equally adequate remedy in the jurisdiction where the parties, the records and the witnesses are located (*Rogers* v. *Guaranty*

Trust Co.; Kelley v. *American Sugar Refining Co.; Healey* v. *Reynolds Tobacco Co.*, all *supra; Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111 (C. C. A. 2d, 1942); and

The fact that a similar suit for the same relief is pending in a court of the corporation's domicile (*Cohen* v. *American Window Glass Co.; Healey* v. *Reynolds Tobacco Co.*, both *supra; cf. Pennsylvania* v. *Williams, supra*).

Upon the basis of the above factors, and upon the uncontroverted facts set forth in the moving affidavits (R. 19-28) and summarized above,* the District Court, finding that it would be most unjust to require the defendant to meet the issues in the Eastern District of New York, held that considerations of convenience, efficiency and justice demanded that it refuse to retain jurisdiction.

Any remaining doubt as to the propriety of the District Court's exercise of its discretion, however, has been dispelled by a circumstance which arose subsequent to the judgment of the District Court dismissing the action and subsequent to the argument of petitioner's appeal from that judgment before the Circuit Court of Appeals, but prior to that Court's decision of the judgment of affirmance.

Schwartz v. Kemper, et al.

On January 18, 1946, a derivative suit against Lumbermens and the individuals constituting its present Board of Directors was instituted in the United States District Court for the Northern District of Illinois, Eastern Division, by a policyholder of the

* Pages 4-7.

company.* All defendants with the exception of Harry E. Stone, a citizen of Massachusetts, and L. G. Purmort, a citizen of Ohio, have entered a general appearance and are subject to the jurisdiction of the Court. A certified copy of the complaint in that action is annexed to this brief as Appendix A. It will readily be seen that the acts and transactions complained of in the *Schwartz* action are substantially identical with those complained of by petitioner herein, and that the relief sought in that action is identical with the relief sought by petitioner.

The First Cause of Action. The first cause of action is identical with that in petitioner's complaint, with this exception: It has been expanded to include compensation paid to defendant Kemper in 1943 and 1944, and relief is sought not merely against Kemper but also against his fellow directors.

The Second Cause of Action. This cause of action is identical with the second cause of action in petitioner's complaint with the following exception: The individual members of the Board of Directors of Lumbermens have been substituted in place of Kemper & Co. of Illinois as co-defendants.

The Third and Fourth Causes of Action. These are identical with the third and fourth causes of action set forth in the petitioner's complaint, with the following exception: They have been expanded to include additional transactions of the same nature

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* *Louis J. Schwartz* v. *James S. Kemper, Mark Kemper, H. G. Kemper, James D. Cunningham, L. G. Purmort, Harry E. Stone, Harry A. Wheeler and Lumbermens Mutual Casualty Company*, N. D. Ill. (E. D.) No. 46C96. (American) Lumbermens Mutual Casualty Company and Lumbermens Mutual Casualty Company are one and the same organization. The prefix "(American)" has long been used in the State of New York to prevent confusion with a local insurance company having a similar name.

alleged to have occurred in 1944, and relief is sought not merely against Kemper but also against his fellow directors.

The Attorneys. Counsel upholding petitioner's position in the Eastern District Court and the Circuit Court of Appeals were Messrs. Abraham L. Pomerantz and William E. Haudek, of the New York Bar (R. 29, 30, 42, 51). In the *Schwartz* action, Mr. Pomerantz appears as an attorney of record (see Appendix A, p. 33) and Mr. Haudek has appeared of counsel in proceedings already had therein.

By the institution of the *Schwartz* action, the negligible expense which would have been entailed by petitioner in bringing his action in Illinois has been even further decreased. He has been afforded an opportunity not only to intervene, but even to be represented "by a lawyer whom he knows and in whom he has confidence" (Petition, p. 16). It is thus obvious that the action instituted in the Eastern District of New York is quite unnecessary to safeguard his rights. *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, 114 (C. C. A. 2d, 1942); *Healey* v. *R. J. Reynolds Tobacco Co.*, 48 F. Supp. 207, 209 (M. D. N. C., 1942).

POINT III.

The District Court was not bound by state law to accept jurisdiction.

Neither the District Court nor the Circuit Court of Appeals was called upon to decide whether a District Court may, in a diversity case, decline jurisdiction where, upon identical facts, jurisdiction would have been retained by a state court. The Circuit Court of

Appeals did not hold, as petitioner erroneously claims (Petition, p. 4), that had this action been brought in the New York State courts, jurisdiction would be mandatory. That Court merely footnoted in passing that "* * * it is interesting to note that the New York courts would not have declined jurisdiction had this been a derivative suit by a *shareholder* in a *stock* corporation." (R. 44-45, n. 2). (Italics supplied.)

The instant action, however, is not a derivative suit by a shareholder in a stock corporation and does not even raise the question decided in *Weiss* v. *Routh*, 149 F. (2d) 193 (C. C. A. 2d, 1945) and *Gilbert* v. *Gulf Oil Corporation*, 153 F. (2d) 883 (C. C. A. 2d, 1946), cert. granted May 20, 1946.

Petitioner cites no cases in support of his position that the New York courts would have retained jurisdiction of the instant action for the simple reason that there are none. In no other state is the distinction between stockholder and policyholder more clearly defined than in New York. Basically, a policyholder in a mutual insurance corporation is a contract creditor. *Seigel* v. *Prudential Insurance Co.*, 286 N. Y. 618 (1941). His rights are curtailed by the peculiar nature of his relationship with the corporation. *People ex rel. Venner* v. *New York Life Insurance Co.*, 111 App. Div. 183, 186-7 (1st Dep't, 1906). And he may not maintain a derivative action until the administrative remedy available to him has been exhausted. *Clifford* v. *Metropolitan Life Insurance Co.*, 264 App. Div. 168 (2d Dep't, 1942), where it was the Court's unanimous decision that

> "If it be assumed that a policyholder may maintain a derivative action, he must at least show

that he has exhausted all other available remedies and that the cause is so meritorious in nature that the failure of the directors to have prosecuted it was tantamount to a breach of duty. (*Isaac* v. *Marcus*, 258 N. Y. 251.) Plaintiffs do not allege that they called upon the State Superintendent of Insurance to exercise his powers pursuant to section 28 of the Insurance Law or to enjoin the conspirators as service organizations. (Insurance Law, §§34, 182, 180, subd. 6.) It was incumbent upon them to do so as a prerequisite to the maintenance of this action, and it is no answer to urge that the Superintendent of Insurance was not obliged to comply with their request * * *" (264 App. Div. at 170).

In view of the fact that the courts of New York have voiced their disapproval of similar actions against domestic mutual insurance corporations, there is no ground for the petitioner's contention that such actions would be entertained if brought in those courts against a foreign mutual insurance corporation. Specifically, there is no ground for petitioner's contention that jurisdiction over the instant action would have been retained, had it been brought in the state courts. To hold that the District Court should have retained jurisdiction would be to create a new right in a State whose courts have denied its existence.

Conclusion.

The decision of the Second Circuit, far from being "a far-reaching innovation in the law of Federal jurisdiction and venue" (Petition, p. 6) is in complete accord with the recent decision of this Court in the *Williams* case. It represents a careful application of

the principle of forum non conveniens in precisely the sort of situation where, as an instrument of justice, it should be applied. Without injuring plaintiff, and without favoring defendants, it provides a place of trial that will harm least and benefit most the interests of the entire body of Lumbermens policyholders.

It is respectfully submitted that the petition be denied.

Respectfully submitted,

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APPENDIX A.

Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action, File Number 46C96

LOUIS J. SCHWARTZ,

Plaintiff,

—vs—

JAMES S. KEMPER, MARK KEMPER, H. G. KEMPER, JAMES D. CUNNINGHAM, L. G. PURMORT, HARRY E. STONE, HARRY A. WHEELER and LUMBERMENS MUTUAL CASUALTY COMPANY,

Defendants.

Plaintiff, for his complaint, alleges on information and belief, except Paragraphs "1(a)", "1(g)", "1(h)" and "2", which he alleges on knowledge:

AS A FIRST CAUSE OF ACTION:

1. (a) Plaintiff is a citizen of the State of New York.

(b) Defendant Lumbermens Mutual Casualty Company ("Lumbermens" hereafter), incorporated in 1912, was at all times since and now is a mutual insurance corporation organized under the laws of the State of Illinois.

(c) The defendants James S. Kemper, Mark Kemper, H. G. Kemper, James D. Cunningham and Harry A. Wheeler are citizens of the State of Illinois.

(d) The defendant Harry E. Stone is a citizen of the Commonwealth of Massachusetts.

(e) The defendant L. G. Purmort is a citizen of the State of Ohio.

(f) The jurisdiction of the court depends on diversity of citizenship.

(g) The amount in controversy, exclusive of interest and costs, exceeds Three Thousand Dollars ($3,000.00).

(h) The action is not a collusive one to confer on a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

2. (a) Since June, 1937, plaintiff has been and he now is a member and policy holder of Lumbermens.

(b) Plaintiff brings this action in the right of Lumbermens and on behalf of all its members and policy holders.

3. (a) The individual defendants constitute the present Board of Directors of Lumbermens.

(b) The directors of Lumbermens from 1925 to date and their times of tenure are listed in Schedule "A" annexed hereto.

4. (a) From 1916 to date James S. Kemper has been and he now is the General Manager and Chairman of the Board of Directors of Lumbermens.

(b) From 1916 to May, 1945, James S. Kemper was also the President of Lumbermens; in May, 1945, he resigned as President and the defendant H. G. Kemper became, and he still is, the President of Lumbermens.

(c) By reason of family relation, friendship and business association, the other directors and officers of Lumbermens were at all times herein mentioned and still are dominated and controlled by James S. Kemper in such

manner that they were and are subservient to his wishes and directions without regard to the best interests of Lumbermens.

(d) By reason of the premises James S. Kemper did at all times herein mentioned and still does dominate and control the management, personnel and business policies of Lumbermens.

(e) The acts and omissions of Lumbermens herein after alleged were caused by James S. Kemper.

5. Prior to 1942, the aggregate salary and other compensation paid by Lumbermens to James S. Kemper were less than $75,000.00 per year.

6. (a) For the year 1942, Lumbermens paid James S. Kemper salary and other compensation aggregating $251,543.63, an increase of more than 235 per cent over the preceding year.

(b) For the year 1943, Lumbermens paid James S. Kemper salary and other compensation aggregating $250,000.00.

(c) For the year 1944, Lumbermens paid James S. Kemper salary and other compensation aggregating more than $250,000.00.

7. Such salary and other compensation for the years 1942, 1943 and 1944 were in excess of the reasonable value of James S. Kemper's services because:

(a) The amounts paid to James S. Kemper prior to 1942 were full and adequate compensation for his services; were so determined by the Board of Directors of Lumbermens; and were so recognized and accepted by James S. Kemper;

(b) The extent of James S. Kemper's services in 1942, 1943 and 1944 was not in excess of those in 1941 and prior years;

(c) The actual cash gross earnings of Lumbermens in 1942 exceeded those in 1941 by only 6.78 per cent; in 1943 and 1944 they fell below those in 1941 by 8.36 per cent and 4.06 per cent, respectively;

(d) The net income of Lumbermens in 1942 exceeded that in 1941 by only 12.25 per cent; in 1943 it fell below that in 1941 by 25.54 per cent; and in 1943 it exceeded that in 1941 by only 10.04 per cent;

(e) The 1942, 1943 and 1944 salaries and other compensation of other managing executives, holding positions comparable to those of James S. Kemper in insurance companies similar to Lumbermens, were not substantially increased over those for the preceding years, except to the extent of reflecting promotions in individual cases;

(f) In the years 1942, 1943 and 1944 the highest aggregate amount of salary and other compensation paid by any insurance company in the United States to its principal executive was less than one-half of that paid by Lumbermens to James S. Kemper;

(g) James S. Kemper did not devote his full time and services to Lumbermens, but occupied executive positions in several other insurance companies and agencies not affiliated with Lumbermens.

8. To the extent that the 1942, 1943 and 1944 payments of Lumbermens to James S. Kemper were in excess of his compensation for the year 1941, they were without consideration and constituted a gift of corporate assets.

9. (a) The individual defendants authorized the aforesaid payments to James S. Kemper with knowledge of the facts alleged in Paragraphs "5" through "8".

(b) In authorizing these payments they failed to exercise honest judgment and were motivated by the interest of James S. Kemper rather than by that of Lumbermens.

(c) The facts alleged in Paragraphs "5" through "8" and in the two preceding subdivisions of this paragraph were never revealed to the members and policy holders of Lumbermens, either in the notices of meetings or in the annual reports sent to them.

10. By reason of the premises, Lumbermens has sustained substantial damages.

11. Demand by plaintiff that the Board of Directors of Lumbermens bring this action was not made, and would have been futile, because:

(a) The members of the Board of Directors are dominated and controlled by James S. Kemper;

(b) They have remained inactive although they have long had knowledge of the acts herein alleged;

(c) They participated in the wrongs herein alleged;

(d) They would not and could not have diligently prosecuted this action because, in effect, they would have had to bring it against themselves.

12. Plaintiff has no adequate remedy at law.

AS A SECOND CAUSE OF ACTION:

13. Plaintiff realleges Paragraphs "1" through "4".

14. (a) James S. Kemper & Co., Inc. ("Kemper & Co." hereafter), incorporated in 1927, was at all times since and now is a corporation organized under the laws of the State of Delaware.

(b) At all times since its organization, James S. Kemper and family members, friends, associates, agents and employees of his held and still hold all or the majority of the capital stock of Kemper & Co.

(c) By reason of the premises, James S. Kemper did during all such times and still does dominate and control the management, personnel and business policies of Kemper & Co.

(d) During all such times James S. Kemper and members of his family had and they still have the beneficial enjoyment of all or the major portion of the profits of Kemper & Co.

15. At all times since its organization Kemper & Co. has been engaged in business as an insurance agent.

16. (a) During all such times Lumbermens employed Kemper & Co. as its agent for the transaction of insurance business in various parts of the United States.

(b) During all such times Lumbermens paid substantial sums to Kemper & Co. as commissions, fees and otherwise.

17. (a) During all such times and since prior to 1927, Lumbermens did and it still does maintain branch offices staffed with its own employees throughout the United States, engage in extensive advertising campaigns, entertain numerous brokerage contacts, and solicit and write insurance without the intervention of a separate or independent agency.

(b) By reason of the premises Lumbermens had and still has the organization, personnel, equipment, facilities and business connections to carry on its business and sell insurance without employing the services of Kemper & Co.

(c) Lumbermens could have secured the same amount of business and could have conducted it with equal efficiency, without employing and paying for the purported services of Kemper & Co.

18. (a) The directors, officers, executives and certain employees of Kemper & Co. were at all times herein men-

tioned and still are directors, officers, executives or employes of Lumbermens.

(b) At all times herein mentioned the office space used or occupied by Kemper & Co. throughout the United States was and still is part of the office space owned or rented by Lumbermens.

(c) At all times herein mentioned Kemper & Co. did and it still does use the organization, personnel, assets and facilities of Lumbermens in the conduct of its business.

(d) Kemper & Co. paid Lumbermens no consideration for the use of its organization, personnel, assets and facilities.

19. (a) The individual defendants authorized and approved Lumbermens' transactions with Kemper & Co. with full knowledge of the matters alleged in Paragraphs "14" through "18".

(b) In authorizing and approving these transactions, they failed to exercise honest judgment and were motivated by the interest of James S. Kemper rather than by that of Lumbermens.

20. (a) The individual defendants concealed the facts herein alleged from the members and policy holders of Lumbermens.

(b) The members and policy holders have remained ignorant of such facts, except that plaintiff discovered them in 1945, shortly before the commencement of this action.

21. (a) By reason of the premises Lumbermens sustained substantial damage and James S. Kemper and members of his family derived substantial profits.

(b) The precise amounts of such damage and profits being unknown to plaintiff, an accounting therefor by the defendants other than Lumbermens is necessary.

22. Plaintiff realleges Paragraphs "11" and "12".

AS A THIRD CAUSE OF ACTION:

23. Plaintiff realleges Paragraphs "1" through "4".

24. (a) On or about January 29, 1926, Lumbermens caused American Motorists Insurance Co. ("Motorists" hereafter) to be organized as a stock corporation under the laws of the State of Illinois.

(b) From its organization to date, Motorists has been and it is engaged in the insurance business.

(c) By reason of the sponsorship by Lumbermens, Motorists partook of the prestige, trade acceptance and goodwill enjoyed by Lumbermens and had access to its business connections and brokerage contacts.

25. (a) From the organization of Motorists to December 30, 1927, Lumbermens held 11,566⅔ shares of stock of Motorists out of a total of 11,666⅔ shares issued.

(b) From December 30, 1927, to December 31, 1944, Lumbermens acquired an aggregate of 11,709⅔ shares and sold an aggregate of 15,385⅔ shares of Motorists.

26. (a) Lumbermens received for the 15,385⅔ shares of stock of Motorists sold from December 30, 1927, to December 31, 1944, a total aggregate price of $937,163.62.

(b) The names of the purchasers, the dates of the sales, the numbers of shares sold, the price of each sale and the liquidating value per share at such dates are listed in Schedule "B" annexed hereto.

27. (a) The individuals to whom Lumbermens sold the shares of Motorists, as aforesaid, were directors or officers of Lumbermens, their family members, friends and business associates.

(b) The officers and directors of the corporations to which Lumbermens sold stock of Motorists, as aforesaid,

were also officers or directors of Lumbermens, or family members, friends or associates of officers or directors of Lumbermens.

(c) James S. Kemper was an officer and director of each such corporation.

28. The prices at which Lumbermens sold the shares of Motorists, as aforesaid, were inadequate because:

(a) The aggregate liquidating value of said shares, at the respective times of the sale thereof, was $162,113.72 greater than the prices paid therefor;

(b) The aggregate true value of said shares, at the respective times of the sale thereof, was substantially greater than their liquidating value;

(c) Said shares were not publicly traded and had no established market value.

29. (a) The individual defendants authorized and approved the aforesaid sales with knowledge of the matters alleged in Paragraphs "24" through "28".

(b) In authorizing and approving these sales, the individual defendants failed to exercise honest judgment and were motivated by the interest of the purchasers rather than by that of Lumbermens.

30. (a) The individual defendants caused the sale pursuant to a conspiracy entered into from time to time among themselves and the purchasers.

(b) The individual defendants concealed the facts herein alleged from the members and policy holders of Lumbermens.

(c) The members and policy holders have remained ignorant of said facts, except that plaintiff discovered them in 1945, shortly before the commencement of this action.

31. In authorizing and approving these sales, the individual defendants did not safeguard the interests of Lumbermens with the care and diligence of a reasonably prudent business man.

32. (a) From 1930 through 1944, annual cash dividends aggregating $33.30 were paid on each share of Motorists.

(b) In 1943 a 33⅓ per cent stock dividend was distributed on each share of Motorists.

(c) The aforesaid purchasers of stock of Motorists either retain such stock or have resold it at a profit; the exact dispositions are unknown to plaintiff and must be disclosed by an accounting.

(d) The present liquidating value of each share of Motorists, after giving effect to the stock dividend, is $116.93; the true value of each such share is substantially greater.

33. By reason of the premises, Lumbermens sustained damages in excess of $1,000,000 and the purchasers of said shares realized profits substantially in excess of such loss.

34. Plaintiff realleges Paragraphs "11" and "12".

As a Fourth Cause of Action:

35. Plaintiff realleges Paragraphs "1" through "4".

36. Since prior to August 1, 1942, National Retailers' Mutual Insurance Company ("Retailers' Mutual" hereafter) has been and it now is a mutual insurance company incorporated under the laws of the State of New York.

37. (a) Prior to August 1, 1942, Retailers' Mutual is

sued and sold $375,000 principal amount of its Guarantee Fund Debentures.

(b) By the terms of each of said debentures, Retailers' Mutual undertook to pay in perpetuity at least 5 per cent interest annually upon the principal amount thereof.

(c) By the terms of each of said debentures, the principal amount thereof was and is not redeemable or callable by Retailers' Mutual, except upon the dissolution of Retailers' Mutual.

38. On or about August 1, 1942, Lumbermens owned and held $225,000 principal amount of the Guarantee Fund Debentures of Retailers' Mutual.

39. (a) On or about August 1, 1942, and at various dates thereafter, Lumbermens sold an aggregate of $175,000 principal amount of said debentures.

(b) Upon each such sale the purchase price was equal or substantially equal to the principal amount of the Guarantee Fund Debentures thus sold.

(c) The approximate dates of such sales, the names of the purchasers, the amounts of debentures sold, and the prices paid therefor are listed in Schedule "C" annexed hereto.

40. (a) The individuals to whom Lumbermens sold the Guarantee Fund Debentures of Retailers' Mutual, as aforesaid, were directors or officers of Lumbermens, their family members, friends and business associates.

(b) The officers and directors of the corporations to which Lumbermens sold Guarantee Fund Debentures of Retailers' Mutual, as aforesaid, were also officers and directors of Lumbermens, or family members, friends or associates of officers or directors of Lumbermens.

(c) James S. Kemper was an officer and director of each such corporation.

41. The prices at which Lumbermens sold the Guarantee Fund Debentures of Retailers' Mutual, as aforesaid, were inadequate because:

(a) Said debentures bore interest at the rate of 5 per cent annually;

(b) Their security was equal to, or better than, the security of corporate bonds of the highest grade investment rating;

(c) Such security rested upon the facts, among others, that the net assets of Retailers' Mutual (substantially all of which were liquid) had and have a value of more than four times the total amount of said debentures outstanding; and that the annual net earnings of Retailers' Mutual were and are more than twelve times the amount of the annual interest payable on such debentures;

(d) Bonds or debentures of comparable security, bearing a similar rate of return and having analogous redemption and other features, were at the time of these sales traded at prices approximately equal to 200 per cent of par;

(e) The fair and reasonable value of the aforesaid Guarantee Fund Debentures, at the time of each of said sales, was not less than 200 per cent of par.

42. (a) The individual defendants authorized and approved these sales with knowledge of the matters alleged in Paragraphs "36" through "41".

(b) In authorizing and approving these sales, the individual defendants failed to exercise honest judgment and were motivated by the interest of the purchasers rather than by that of Lumbermens.

43. (a) The individual defendants caused these sales pursuant to a conspiracy entered into from time to time among themselves and the purchasers.

(b) The individual defendants concealed the facts herein alleged from the members and policy holders of Lumbermens.

(c) The members and policy holders have remained ignorant of said facts, except that plaintiff discovered them in 1945, shortly before the commencement of this action.

44. In authorizing and approving these sales, the individual defendants did not safeguard the interests of Lumbermens with the care and diligence of a reasonably prudent business man.

45. By reason of the premises, Lumbermens sustained damages in excess of $175,000.

46. Plaintiff realleges Paragraphs "11" and "12".

WHEREFORE, plaintiff demands judgment:

I. Requiring the individual defendants to account to Lumbermens for the damages and profits alleged herein, with interest;

II. Awarding plaintiff the costs and expenses of this action, including reasonable counsel and accountants' fees; and

III. Granting plaintiff such other and further relief as may be just.

LOUIS J. SCHWARTZ
Plaintiff

M. J. MYER & NOLAN H. TEPPER
M. J. Myer and Nolan H. Tepper
77 West Washington Street
Randolph 0132

A. L. POMERANTZ
A. L. Pomerantz
295 Madison Avenue
New York 17, New York.

State of New York
County of New York—ss

LOUIS J. SCHWARTZ, being first duly sworn upon oath, deposes and says that he is the plaintiff in the above and foregoing complaint by him subscribed; that he has read the same and knows the contents thereof, and that the same is true except for such matters as are therein stated to be upon information and belief, which matters he believes to be true.

LOUIS J. SCHWARTZ

Subscribed and sworn to before me this
4 day of January, 1946.

H. WM. TANNENBAUM
Notary Public

H. WM. TANNENBAUM
Notary Public
Kings Co. Clk's No. 44, Reg. No. 48-T-5
N. Y. Co. Clk's No. 140, Reg. No. 55-T-5
Commission Expires March 30, 1946

SCHEDULE A

Directors of Lumbermens From 1925 to Date

Name	Tenure	
	From	Through
H. W. Chandler	1925	1930
E. W. Dierssen	1925	1931
G. J. Farnsworth	1925	1940
E. E. Hooper	1925	1934
H. G. Kemper	1925	to date
J. S. Kemper	1925	to date
C. A. L. Purmort	1925	1930
C. M. Purmort	1931	1940
H. E. Stone	1932	to date
H. A. Wheeler	1936	to date
Mark Kemper	1936	to date
L. G. Purmort	1941	to date
James D. Cunningham	1941	to date

SCHEDULE B

Sales by Lumbermens of Stock of Motorists

Names of Purchasers	Date of Sale	No. Shares Sold	Price Per Share	Total Proceeds of Sales	Liquidating Value Per Share	Excess of Liquidating Value Per Share Over Price Per Share	Total Excess of Liquidating Value Over Proceeds
Chandler, Farnsworth and Kemper	12/30/27	5,500	$53.47	$294,119.18	$ 53.52	$ .05	$ 14,705.95
H. G. Kemper	4/12/29	125	63.4[illegible]	7,931.43	63.45	....	.....
Commercial Mutual Underwriting Corp.	12/30/31	8,406⅔	65.00	546,433.33	73.25	8.25	69,358.00
National Illinois Corporation	9/16/35	⅔	62.00	41.34	89.43	27.43	18.29
Mrs. Gertrude Z. Kemper	3/31/37	30	70.00	2,100.00	108.24	38.24	1,147.20
H. J. Giffing	3/31/37	5	70.00	350.00	108.24	38.24	191.20
R. H. Campbell	3/31/37	5	70.00	350.00	108.24	38.24	191.20
A. H. Stringe	3/31/37	35	70.00	2,450.00	108.24	38.24	1,338.40
Harry A. Wheeler	3/31/37	25	70.00	1,750.00	108.24	38.24	956.00
W. B. Morrell	3/31/37	15	70.00	1,050.00	108.24	38.24	573.60
H. W. Lunsche	4/7/37	7	70.00	490.00	108.24	38.24	267.68
J. C. Wilson	4/22/37	10	70.00	700.00	108.24	38.24	382.40
Frank J. Heitman	4/26/37	70	70.00	4,900.00	108.24	38.24	2,676.80
American Motorists Insurance Co.	4/28/37	2	30.00	60.00	108.24	78.24	156.48
National Retailers Mutual Insurance Co.	4/30/37	50	70.00	3,500.00	108.24	38.24	1,912.00
J. E. Magnus	4/19/39	25	69.00	1,725.00	116.80	47.80	956.00
R. J. Dunn	8/1/42	30	66.67	2,000.00	135.69	69.02	2,070.60
Chase M. Smith	8/1/42	75	66.67	5,000.00	135.69	69.02	5,176.50
Gertrude Z. Kemper	8/1/42	30	66.67	2,000.00	135.69	69.02	2,070.60
Charles E. Good	8/1/42	75	66.67	5,000.00	135.69	69.02	5,176.50
Norris C. Flanagin	8/1/42	115	66.67	7,666.67	135.69	69.02	7,937.30
Robert H. Campbell	8/1/42	30	66.67	2,000.00	135.69	69.02	2,070.60
Edward S. Beck (Dec'd)	8/1/42	70	66.67	4,666.67	135.69	69.02	4,831.40
Marie J. Rowe	8/1/42	38	66.67	2,533.33	135.69	69.02	2,622.76
Dwight S. Bobb	8/1/42	150	66.67	10,000.00	135.69	69.02	10,353.00
H. E. Stone	8/1/42	100	66.67	6,666.67	135.69	69.02	6,902.00
Central Mortgage Co.	1943	11⅓	60.00	680.00	140.67	80.67	914.26
Central Mortgage Co.	1/19/44	100	60.00	6,000.00	109.02	49.02	4,902.00
Central Mortgage Co.	1/31/44	50	60.00	3,000.00	109.02	49.02	2,451.00
Lumbermens Mutual Fire Insurance Co. of Boston	3/3/44	200	60.00	12,000.00	109.02	49.02	9,804.00
Totals		15,385⅔		$937,163.62			$162,113.72

SCHEDULE C

Sales by Lumbermens of Guaranty Fund Debentures of Retailers Mutual

Date	Names of Purchasers	Par Value of Debentures Sold	Consideration Received
8/1/42	Charles M. Purmort	$ 10,000.00	$ 10,000.00
8/1/42	Charles E. Good	5,000.00	5,000.00
8/1/42	Norris C. Flanagin, City National Bank and Trust Co. and Hathaway G. Kemper, Trustees No. T/A 22217	2,500.00	2,500.00
8/1/42	Robert H. Campbell	25,000.00	25,000.00
8/1/42	Edward S. Beck	3,000.00	3,000.00
8/1/42	Vance C. Smith, Jr.	5,500.00	5,500.00
8/1/42	H. G. Kemper	1,000.00	1,000.00
8/1/42	Harry E. Stone	9,000.00	9,000.00
8/1/42	James S. Kemper	3,500.00	3,500.00
8/1/42	James S. Kemper & Co.	4,000.00	4,000.00
8/1/42	Marjorie B. Haviland	20,000.00	20,000.00
8/1/42	Joan Stover	1,200.00	1,200.00
9/30/42	Mary S. Kemper	1,000.00	1,000.00
11/16/43	Central Mortgage Co.	5,600.00	5,600.00
1/20/43	Central Mortgage Co.	5,750.00	5,865.00
7/2/43	Central Mortgage Co.	7,000.00	7,140.00
12/12/44	Central Mortgage Co.	3,000.00	3,060.00
12/29/44	Central Mortgage Co.	2,000.00	2,040.00
12/30/44	The James S. Kemper Foundation	20,950.00	21,369.00
		40,000.00	40,000.00
	Totals	$175,000.00	$175,774.00

United States of America
Northern District of Illinois—ss:

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Complaint (certificate of County Clerk and Clerk of the Supreme Court, New York County, re qualification of Notary Public to take oath of plaintiff omitted from this copy) filed January 16, 1946, in the case of Louis J. Schwartz vs. James S. Kemper, et al., No. 46 C 96, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 23rd day of July, A. D. 1946.

ROY H. JOHNSON
Clerk.

By S. M. Shepard
Deputy Clerk.

(Seal)